

January 10, 2003

Greetings:

My legal counsel, Steve Brown, wrote a memorandum to the Montana Society of Association Executives (MSAE) on January 8, 2003, addressing MSAE's questions about the reporting of expenditures made by principals to influence the introduction or enactment of legislation by the Montana Legislature under Montana's Lobbyist Disclosure Act and rules. The memorandum provides guidance to both principals and lobbyists on lobbyist disclosure issues and is reproduced, in pertinent part, following this brief introduction. I trust you will find the following information useful.

Linda L. Vaughey
Commissioner

MEMORANDUM

INTRODUCTION

It is important to review this memorandum in light of the following brief history of Montana's Lobbyist Disclosure Act. As you know, MSAE challenged the constitutionality of the 1980 Lobbyist Disclosure Initiative (I-85) immediately after its passage by the electorate. See *Montana Automobile Association v. Greely*, 193 Mont. 378, 632 P. 2d 300 (1981). The Montana Bar Association also filed a court challenge to the Initiative in 1981. See *Sate Bar of Montana*, 193 Mont. 477, 632 P. 2d 707 (1981). Although Montana's Supreme Court invalidated several provisions of I-85 in the MSAE litigation, the Court also expressly held that the constitutional provisions of I-85 (which remain essentially unamended since 1980) established a compelling state interest and an "obvious public interest in the regulation and disclosure of lobbying activities." See *Montana Automobile Association, supra*, at p. 384; and *Krivec, supra*, at p. 485, respectively. *Montana Automobile Association, supra*, at p. 384, cited *Buckley v. Valeo*, 424 U.S. 1, 67, 96 S.Ct. 612, 657 (1976) for the proposition that judicial notice "may be taken of the compelling need for disclosure laws which have as their purpose the deterrence of corruption and the avoidance of appearances of corruption."

The Montana Supreme Court has clearly and unequivocally recognized that Montanans have demanded that lobbying expenditures be regulated and reported to deter corruption and avoid even the appearance of corruption. See also Section 5-7-101(1), MCA.

I. GENERAL ANALYSIS

All of the issues raised by MSAE involve general provisions of the Act and rules, most of which have been in effect for at least the past 20 years. Before responding to the specific

issues stated in your December 24, 2002 memorandum, it is necessary to discuss the general statutory and rule provisions that govern the reporting requirements under the Lobbyist Disclosure Act and rules.

A. Lobbying, Lobbyists and Principals

Because of the expansive definition of "quasi-judicial function" adopted by the Supreme Court in *Krivec, supra* (see also ARM 44.12.101A), only lobbying activities that involve "the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature..." are presently reportable. Section 5-7-102(6)(a), MCA, and ARM 44.12.102(7). An individual is "lobbying" if he/she engages in "direct communication" with the legislature or a legislator to "promote or oppose" the introduction or enactment of legislation, presents oral or written testimony to legislators or signs a sign-in sheet as a proponent or opponent at a legislative hearing. ARM 44.12.102(3). The term "direct communication" includes "face-to-face meetings, telephone conversations, and written or electronic correspondence or communication with a public official" (a legislator is included in the current definition of public official). ARM 44.12.102(2). A "principal" is a person "who employs a lobbyist." Section 5-7-102(12), MCA. A "lobbyist" is a person "who engages in lobbying for hire." Section 5-7-102(8)(a), MCA. The term "lobbying for hire" includes "activities of the officers, agents, attorneys, or employees of a principal who are paid, reimbursed, or retained by the principal and whose duties include lobbying...." Section 5-7-102(7), MCA. A "payment" includes a "distribution, transfer, loan, advance, deposit, gift, or other rendering made of money, property, or anything of value." Section 5-7-102(9), MCA. A "payment to influence official action" includes either of the following:

1. a "direct or indirect payment to a lobbyist by a principal, such as salary, fee, compensation, or reimbursement for expenses ..." Section 5-7-102(10)(a), MCA; or
2. a "payment in support of or assistance to a lobbyist or a lobbying activity, including but not limited to the direct payment of expenses incurred at the request or suggestion of the lobbyist." Section 5-7-102(10)(b), MCA.

B. Exemptions From Registration and Reporting

Despite the all-encompassing language of the definitions cited in Part A of this memorandum, those same definitions and other provisions of the Act and rules create the following exemptions from the reporting and lobbyist registration requirements of the Act:

1. An "individual acting solely on his own behalf" is not a lobbyist. Section 5-7-102(8)(b)(i), MCA, and ARM 44.12.102(5)(a). In addition, Section 5-7-101(2), MCA, expressly states that nothing in the Act "subjects an individual lobbying on his own behalf

to any reporting requirements nor deprives an individual of the constitutional right to communicate with public officials." The "own behalf" term is not defined in Section 5-7-102, MCA. The "own behalf" exemptions were addressed only in passing in *Montana Automobile Association, supra*, at p. 385, when the Montana Supreme Court ruled that if an "individual Montana citizen lobbying in his own behalf is immune from the reach of the ... [Lobbyist Disclosure Initiative], so too is the individual citizen of a sister state." *Krivec* did not address the "own behalf" exemptions and there was little, if any, discussion of these exemptions at the Lobbying Advisory Group meetings.

It is clear that the "own behalf" exemptions only apply to an individual (i.e., a human being--see Section 5-7-102(5), MCA, and *Montana Automobile Association, supra*, at p. 385). Persons other than human beings (i.e., corporations, firms, associations, partnerships, governmental entities organizations or groups--see Section 5-7-102(11), MCA) cannot invoke the "own behalf" exemptions.

Section 5-7-102(8)(b)(i), MCA, states that an individual must be "acting solely on his own behalf" (emphasis added) to avoid being classified as a lobbyist. Section 5-7-101(2), MCA, omits the word "solely" but emphatically states that nothing in the Lobbyist Disclosure Act "subjects an individual acting on his own behalf to any reporting requirements" The one-word difference in the respective "own behalf" exemptions is, in my opinion, not significant. The crucial issue to be addressed is what does lobbying on one's "own behalf" mean in relation to the lobbyist registration and reporting requirements of the Act.

As the administrator of Montana's Lobbyist Disclosure Act, the Commissioner is required to apply the same rules of statutory construction as a court. The Commissioner must "ascertain and declare what is in terms or in substance contained" in the Act. Section 1-2-101, MCA. Although the Commissioner cannot insert what has been omitted or omit what has been inserted, the Commissioner must construe the particulars of the Act in a manner that will, if possible, "give effect to all." *Id.* The Act is presumed to be constitutional and, in fact, has withstood two constitutional challenges. See *Montana Automobile Association, supra*, and *Krivec, supra*. Within this context, I will advise the Commissioner that the "own behalf" exemptions must be reconciled with the registration and reporting requirements of the Act and rules as follows:

An individual who lobbies and receives no payment or reimbursement from a person other than himself/herself to engage in direct communication with a legislator to influence the introduction or enactment of legislation is lobbying on his/her own behalf. The word "person" is defined in the Act to mean "an individual, corporation, association, firm, partnership, state or local government or subdivision of state or local government, or other organization or group of persons." Section 5-7-102(11), MCA. The "own behalf" exemptions can only be claimed by an individual, not the other entities identified in the definition of "person." An individual who is being paid or reimbursed to lobby as an employee, officer, agent or attorney by an entity other than himself/herself is lobbying for

hire as defined in 5-7-102(7), MCA. The exception is a sole proprietorship, where an individual personally owns the business. A family corporation owned by one individual would not qualify for the "own behalf" exemptions if the individual owner is paid or reimbursed to lobby by the corporate entity. A corporation, even if owned by a single individual, is not an individual under the definitions of the Act. See Subsections 5-7-102(5) and (11), MCA. However, the individual owner can invoke the "own behalf" exemptions if he/she pays or reimburses himself/herself out of his/her personal accounts, not the corporate accounts.

The "own behalf" exemptions are discussed in further detail on pages 9 and 10 of this memorandum.

2. An "individual working for the same principal as a licensed lobbyist" is not a lobbyist if the "individual does not have personal contact involving lobbying with a public official on behalf of his principal." Section 5-7-102(8)(b), MCA, and ARM 44.12.102(5)(c). The Lobbying Act and rules do not define the term "personal contact." However, for a number of years the rules define the term "direct communication" and that has been the term used as the initial test for determining whether an individual should consider registering as a lobbyist. The term "direct communication" means "face-to-face meetings, telephone conversations, and written or electronic correspondence with a public official." ARM 44.12.102(2).

3. The exclusions from the definition of "lobbyist" state that nothing "in this section deprives an individual not lobbying for hire of the constitutional right to communicate with public officials." Section 5-7-102(8)(c), MCA. This exclusion is a reaffirmation of the "own behalf" exemptions contained in 5-7-101(2) and 5-7-102(8)(b)(i), MCA.

4. Payments made to a lobbyist for "personal living expenses" are not reportable as lobbying expenditures. See the definition of "payment to influence official action," Section 5-7-102(10)(a), MCA. ARM 44.12.102(9) defines the term "personal living expenses" as "payments or reimbursement by a principal for a lobbyist's meals, food, lodging or residential utilities." ARM 44.12.104 limits reimbursement for a lobbyist's personal living expenses to "actual and necessary" expenses and imposes written receipt and record keeping requirements.

5. An individual who is reimbursed only for "personal living and travel expenses, which together are less than \$1,000 per calendar year ..." is not "lobbying for hire." Section 5-7-102(7), MCA. Because Section 5-7-102(10)(a), MCA, provides that all payments and reimbursement to a lobbyist for personal living expenses are not reportable, the Commissioner has adopted rules reconciling the 5-7-102(7), MCA, exemption with 5-7-102(10)(a), MCA. See ARM 44.12.102(8)(a) and (12). Under 44.12.102(8)(a), the 5-7-102(7), MCA, exemption can only be claimed if the lobbyist receives payments of less than

\$1,000 per calendar year for travel expenses (all personal living expenses are exempt from reporting under 5-7-102(10)(a), MCA). If a principal pays a lobbyist more than \$1,000 per calendar year in travel expenses or pays a lobbyist any amount of money as a salary, fee or other compensation (except for personal living expenses), then the 5-7-102(7), MCA, exemption cannot be claimed. See ARM 44.12.102(8)(a) for reporting obligations applicable to a principal who pays more than one individual \$1,000 or less for travel expenses in a calendar year.

Other exemptions in the Act or rules will be discussed later in this memorandum if those exemptions are relevant to the issues stated in your December 24, 2002 memorandum.

C. Lobbying Activities

The term "lobbying activity" used in Sections 5-7-102(10)(b) and 5-7-111, MCA, is defined in ARM 44.12.102(4) to mean "actions or efforts by a lobbyist to lobby or to support or assist lobbying, including preparation and planning activities after a decision has been made to support or oppose official action, research and other background work that is intended, at the time it is performed, for use in lobbying or to support or assist lobbying activities" (emphasis added). This definition leaves in place the "derivative research" exemption recognized in *Montana Automobile Association, supra*, at pp. 394 and 395. Derivative (initial) research to determine whether the principal will support or oppose the introduction or enactment of legislation is not a reportable lobbying expenditure. However, once the principal makes the decision to support or oppose the introduction or enactment of legislation, payments made to a lobbyist for lobbying activities as defined in ARM 44.12.102(4) are reportable.

Please note that the definition of "lobbying activity" and other rules do not require that lobbying support personnel payments and costs be reported. Compensation, office space, equipment, supplies and other reimbursements paid to the accountants, attorneys, secretaries and other support staff who research, write and assist in the preparation of documents and other information used in the lobbying effort are exempt from reporting unless they engage in lobbying (direct communication with legislators or the legislature). The lobbying rules originally noticed to the public on May 6, 2002 would have required a principal to report lobbying support personnel payments and expenses. The lobbying support personnel provisions of the proposed rules were deleted based on comments received at the June 11, 2002 public hearing.

D. Exemptions From the Definition of Lobbying Activity

The definition of "lobbying activity" contains several exemptions that may apply to the membership organizations that belong to MSAE:

1. Information or testimony submitted in response to a legislative subpoena is not a lobbying activity. ARM 44.12.102(4)(a).

2. The "bona fide news story" exemption in Montana's Campaign Finance and Practices Act (Sections 13-1-101(6)(b)(ii) and 13-1-101(10)(b)(iii), MCA) was adopted as an exemption to the definition of lobbying activity. ARM 44.12.102(4)(d). This exemption recognizes the basic First Amendment right to communicate with the media as a nonreportable event under both the Campaign Finance and Practices Act and the lobbyist disclosure rules. The bona fide news story exemption has not been interpreted under the lobbying rules as of this date. The same exemption under the campaign finance laws was recently interpreted by Commissioner Vaughey as being limited to the cost of preparing the bona fide press release, commentary or editorial, not the cost of the expensive underlying studies or campaign documents prepared as part of the coordinated campaign activity. See the August 7, 2002 Decision *In the Matter of the Complaint Against Mont-Pirg, et al.*, at pp. 52-54.

3. Communications by a membership organization or corporation to its members, shareholders or employees are exempt from being reported as lobbying expenditures. ARM 44.12.102(4)(e). This rule exemption is identical to the statutory exemption recognized in Montana's Campaign Finance and Practices Act, Sections 13-1-101(6)(b)(iii) and 13-1-101(10)(iv), MCA. The membership/shareholder/employee communication exemption has not been interpreted under the lobbying rules as of this date. However, several decisions by Commissioners Vaughey and Argenbright have interpreted the same exemption under the campaign finance laws and rules. Those decisions indicate that the membership/ shareholder/employee communication exemption may be lost if the membership organization or corporation sends the communication unsolicited to persons other than its members, shareholders or employees. See the June 20, 2000 Decision *In the Matter of the Complaint Against the Montana Chamber of Commerce, et al.*, at p. 52; and the April 30, 1998 Decision *In the Matter of Montanans for Common Sense Water Laws/Against I-122*, at pp. 86-90. The same rationale most likely would apply to a membership communication expressing support for or opposition to the introduction or enactment of legislation if the communication is sent unsolicited directly to legislators at the same time it is sent to members, shareholders or employees. However, unlike campaign finance reporting, the amount that would have to be reported under the Lobbyist Disclosure Act and rules would be limited to the payments made to the lobbyists who helped prepare the communication and the proportional cost of printing and distributing the copies of the communication distributed directly to legislators.

4. Information or testimony submitted to the legislature that is compelled by statute or other act of the legislature is not a lobbying activity. ARM 44.12.102(4)(f).

5. Information or testimony "provided in response to an oral or written request from a legislative committee, the legislature or a public official" that is "made during a public hearing or other public proceeding" is exempt from reporting if the information "does not support or oppose the official action under consideration." ARM 44.12.102(4)(g). This exemption allows lobbyists to respond to legitimate requests for information from legislators or legislative committees without reporting the time spent responding to the request (including research time and preparation time). Please note that this exemption only applies if the information request is made during a public proceeding and the information provided does not support or oppose the official action under consideration. Private requests by legislators to lobbyists made over dinner or information provided by a principal's lobbyist that expresses support or opposition to the introduction or enactment of legislation do not fall under this exemption. By requiring that the information request be made during a public proceeding of the legislature, concerns about the legitimacy of the request for information can be debated by the members of the committee or the legislative body or objections raised by other lobbyists.

E. Lobbying Reports

Section 5-7-208, MCA, specifies when reports must be filed and what must be included in those reports. Even if no expenditures are made in a reporting period, a report stating that fact must be filed. Section 5-7-208(4), MCA. Each lobbyist disclosure report must list "payments for lobbying in each of the following categories:"

1. printing;
2. advertising, including production costs;
3. postage;
4. travel expenses;
5. salaries and fees, including allowances, rewards and contingency fees;
6. entertainment expenses (see 5-7-208(5)(b), 5-7-210, MCA, and ARM 44.12.209);
7. telephone and telegraph; and
8. other office expenses.

See Section 5-7-208(5)(a), MCA, ARM 44.12.207 and ARM 44.12.211(1)(c). Principals must retain all records relied on to file lobbying reports for three (3) years from the date of

the filing of the report. Section 5-7-212, MCA, and ARM 44.12.202. Lobbyists are required to maintain and submit records to their principals that will facilitate the proper reporting of lobbying expenditures and efforts to influence the introduction or enactment of legislation. ARM 44.12.103. See also Section 5-7-208(5)(d), MCA.

ISSUE #1

Must an employer register as a principal and report payments made to an employee who, at the employer's request or direction, contacts a legislator to advocate the passage or defeat of legislation by phone call, fax, e-mail or personal visit? Must the employee request and receive time off without pay to make the communication? Although unstated in your December 24, 2002 memorandum, I assume you also want me to address two related issues:

Does it matter whether the fax, e-mail or letter is written at the employer's business, using the employer's office space, equipment and supplies, as opposed to the employee writing and sending the fax, e-mail or letter from his personal residence and at the employee's personal expense?

Must the employee register as a lobbyist because he/she has engaged in direct communication with a legislator?

1A.

All of these issues require application of the initial test to determine whether lobbying registration and reporting requirements may be triggered. The employee has been requested or directed by his employer to engage in "direct communication" with a legislator as defined in ARM 44.12.102(2). Engaging in direct communication with the Legislature or its individual members to promote or oppose the introduction or enactment of legislation may trigger lobbyist/principal registration or reporting. The definition of "direct communication" is not new and has been in effect for a number of years.

The next consideration is whether the employee is being "paid, reimbursed, or retained" to lobby (to engage in direct communication with a legislator). Section 5-7-102(7), MCA. The payments to the employee can be either "direct or indirect" and can include "the direct payment of expenses incurred at the request or suggestion of ... [a] lobbyist." Section 5-7-102(10), MCA. If the employee is being paid or receives any compensation or reimbursement from his employer to engage in direct communication with legislators for the purpose of influencing the introduction or enactment of legislation, then the employee is lobbying and must be registered as a lobbyist unless otherwise exempted by the Act or rules. The employer who pays or reimburses his/her employees to engage in direct communication with legislators to influence the introduction or enactment of legislation is a principal who must report lobbying expenditures. If an employer allows or directs his

employees to use the employer's office space, equipment, utilities and supplies to write letters, e-mails and faxes or use telephones to engage in direct communication with legislators to support or oppose the introduction or enactment of legislation, the employer is making a reportable lobbying payment or reimbursement. See page 5 of this memorandum.

It was suggested on December 17, 2002 that employees who engage in infrequent direct communication with legislators to influence the introduction or enactment of legislation at the request or directive of their employer are not "employed" as lobbyists. It was also asserted that if the employee's job description did not include lobbying as a job duty, the employer did not become a principal and did not have to report the lobbying expenditures of his/her employees. The Commissioner's office will look beyond an employee's job description to determine if the employer has, in fact, directed and authorized payments to employees for lobbying. Section 39-2-101, MCA, defines "employment" as a "contract" by which the employer engages an employee "to do something for the benefit of the employer or a third person." An employer who orally or in writing requests or directs the employer's employees to engage in direct communication with legislators to influence the introduction or enactment of legislation and pays those employees salaries, reimbursement or compensation or provides office space, equipment, utilities or supplies to accomplish the direct communication is subject to the registration and reporting requirements of the Act and rules.

The answer in the preceding paragraph would not apply if:

1B.

an employer asks his employees to voluntarily contact legislators to support or oppose possible or pending legislation and some or all employees voluntarily engage in direct communication with legislators for the purpose of influencing the introduction or enactment of legislation after work hours or on their days off and the legislative contacts do not involve the use of the employer's office space, equipment, utilities or supplies or any reimbursement for the employee's expenses incurred in contacting legislators. The employee does not have to take leave without pay when he/she voluntarily engages in direct communication with legislators if he/she pays all lobbying expenses incurred out of his/her personal finances and the employer does not reimburse the employee for the personal lobbying expenses incurred. Under the facts described in this paragraph, the employee who voluntarily contacts legislators at his/her own expense does not have to register as a lobbyist. The employee may invoke the "own behalf" exemptions because he/she is not being paid or reimbursed by the employer to lobby. The employer's communications with his/her employees about possible or pending legislation are exempt from the definition of lobbying activity in ARM 44.12.102(4)(e). The employer would not have to report any lobbying expenditures or register any employees as lobbyists under the facts of this paragraph 1A. See the discussion of the employee communication exemption on page 10 of this memorandum.

1C.

If the employer pays his employees only personal living and travel expenses to engage in direct communication with legislators for the purpose of influencing the introduction or enactment of legislation, such expenditures may be exempt from reporting and the employees may be exempt from registering as lobbyists. See the discussion of the personal living/travel expense exemption on page 4 of this memorandum. Remember: the Section 5-7-102(7), MCA, exemption cannot be claimed if the lobbyist is paid any amount as a salary, fee or reimbursement other than for travel or personal living expenses.

1D.

The analysis of ISSUE 1A applies even if the employer is a sole proprietor who has personally invoked the "own behalf" exemptions. If a sole proprietor pays or reimburses his/her employees to engage in direct communication with legislators to support or oppose proposed or pending legislation, such payments and reimbursements made to the employees, including the value of office space, equipment, utilities and supplies made available to the employees for lobbying purposes, must be reported by the sole proprietor as lobbying expenditures and the employees who lobby must be registered (unless the travel/personal living expense exemption discussed in part 1C applies). The sole proprietor may continue to invoke the "own behalf" exemptions and not report any payments made to himself/herself, including the value of office space, equipment, utilities and supplies he/she personally owns as a sole proprietor and uses in the sole proprietor's personal lobbying efforts.

ISSUE #2

A membership organization contacts its members and urges them to engage in direct communication with legislators to support or oppose the introduction or enactment of legislation. Individual members of the organization contact legislators by letter, e-mail, fax, phone or personal visit to support or oppose pending legislation.

Must the individual members of the membership organization report the expenditures made to engage in direct communication with legislators to support or oppose the introduction or enactment of legislation?

2A.

Individuals who are members of a membership organization must comply with the registration and reporting requirements of the Act and rules if the individuals who engage in direct communication with legislators to support or oppose the introduction or enactment of legislation are paid or reimbursed to engage in lobbying. See the analysis in Part 1A of this memorandum. If the facts in ISSUES 1B and 1C apply, then no lobbyist registration or reporting would be required. If the member is a sole proprietor, the analysis in ISSUE 1D

would apply.

Must the membership organization report the expenditures made by its individual members to engage in direct communication with legislators to support or oppose the introduction or enactment of legislation?

2B.

No. Unless the membership organization paid or reimbursed its members to engage in direct communication with legislators to influence the introduction or enactment of legislation, the membership organization has no obligation to report the lobbying done by its members. In addition, the cost of communicating with its members is generally not a reportable lobbying expenditure for a membership organization. See page 6 of this memorandum.

ISSUE #3

A membership organization (the Montana Trial Lawyers Association) has only individual members (no firm or company membership). The membership organization e-mails its members urging them to contact legislators to vote for legislation pending in a committee. After the legislation passes out of committee, another e-mail is sent urging the members to contact legislators to pass the legislation when it comes to a floor vote. Individual members do engage in direct communication with legislators urging passage of the legislation. I am asked to assume that each member who made legislative contacts involving direct communication with legislators made two legislative contacts. I will also assume that the membership organization does not pay or reimburse its members to engage in direct communication with legislators to influence the introduction or enactment of legislation.

Is the membership organization required to report the legislative contacts involving direct communication with legislators made by its individual members?

3A.

No. See the analysis of ISSUE 2B in this memorandum.

If the answer to the preceding question is "yes," what is the membership organization required to report as a lobbying expenditure?

3B.

No answer required.

If individual members do not inform the membership organization that they engaged in direct communication with legislators to support enactment of legislation, is the membership organization at risk for not fully reporting all legislative contacts by its members?

3C.

Not under the facts discussed in ISSUE 3A.

Do individual members have to register as lobbyists if they engage in direct communication with legislators to influence the enactment of legislation?

3D.

Only if the individual members are paid or reimbursed by their law firms to engage in direct communication with legislators to influence the enactment of legislation. See the analysis of ISSUES 1A, 1B, 1C and 1D in this memorandum.

I also take this opportunity to address a specific set of facts raised by Mr. Al Smith at the December 17, 2002 luncheon and in subsequent correspondence with the Commissioner. The initial question raised by Mr. Smith was whether the President of the Montana Trial Lawyers, Mr. Mike Meloy of Helena, has to be registered as a lobbyist when he testifies on bills of interest to the MTLA. Subsequently, MTLA submitted a lobbyist registration form for Mr. Meloy "under protest." The MTLA lobbying registration letter accompanying Mr. Meloy's lobbying application states that Mr. Meloy will not receive payment or reimbursement from MTLA or his law firm to testify before legislative committees to support or oppose legislation. In the absence of such payment or reimbursement, the MTLA asserts that Mr. Meloy is not "lobbying for hire." I agree. Commissioner Vaughey has already returned Mr. Meloy's lobbying application and the lobbying registration fee based on the content of this memorandum.

ISSUE #4

The issues in this section are similar to the matters discussed under Issue #3, but with the following distinctions:

Do the individual members of the membership organization have to report directly to the Commissioner because they have engaged in direct communication with legislators to influence the passage of legislation?

4A.

Not unless the individual's law firm has paid or reimbursed the individual member to engage in direct communication with legislators to influence the passage or defeat of legislation. It must be noted, however, that this answer may also be dependent on whether

the individual uses office space, equipment, utilities and supplies provided by the law firm to send e-mails, letters and faxes or engages in direct communication via office telephone. Please review the analysis of ISSUES 1A through 1D.

My analysis of all of the questions under ISSUE #4 assumes that the law firm has no policy prohibiting an individual member of the firm from using the firm's office space, equipment, utilities and supplies to lobby and that the firm is aware of the individual's efforts to lobby. Please see my analysis of a situation where the employer or business entity has a policy prohibiting lobbying or the use of office space, equipment, supplies and utilities for lobbying activities not authorized by the employer or business entity (ISSUE 5B, page 16 of this memorandum).

If the answer to the preceding question is "yes," what do the individual members have to report as expenditures?

4B.

If the member receives any salary, fee or other compensation for the time spent writing e-mails, faxes or letters or engaging in telephone conferences or personal conversations with legislators urging them to vote for or against legislation, the compensation paid must be reported. If the individual receives no salary, fee or other compensation for his/her time, but uses office space, equipment, utilities and supplies provided by the law firm, the value of the office space, equipment, utilities and supplies must be reported as a lobbying expenditure as provided in ARM 44.12.207. Please note that if the legislative contacts by an individual member of the firm are minimal, the value of the office space, equipment, supplies and utilities can be reported as less than \$1,000 for the reporting period. See ARM 44.12.207(2).

Do the individual members who engage in direct communication with legislators to support or oppose the enactment of legislation have to register as lobbyists?

4C.

If the individual member receives any salary, fee, reimbursement or other compensation, including office space, equipment, utilities or supplies provided by the law firm, the member must register as a lobbyist and the law firm must report lobbying expenditures as a principal.

Do the companies or firms for whom the individual members work have to register and file reports as principals?

4D.

Yes. See the answer to 4B and 4C and the analysis of ISSUES 1A through 1D.

If an individual member makes only one contact involving direct communication with

one legislator urging passage of one bill, are there any reporting requirements?

4E.

Yes. Montana's Lobbyist Disclosure Act contains no exemptions for minimal and infrequent legislative lobbying. Many other states do, but the drafters of I-85 chose not to create an exclusion for an individual who makes only one or two lobbying contacts and receives minimal compensation or reimbursement for engaging in direct communication with legislators to influence the passage or defeat of legislation. The closest the Act comes to recognizing a minimal and infrequent lobbying exemption is the travel/personal living expense exemption in 5-7-102(7), MCA.

Please note that the 2003 Legislature will be considering SB 7. Included in SB 7 is a proposed amendment to 5-7-103, MCA, that would create an exemption from paying the lobbyist registration fee for any individual who receives payments or reimbursement for lobbying of less than \$1,000 in a calendar year. The lobbyist would still have to be registered and the principal would have to file reports, but the \$150 lobbyist registration fee would not have to be paid.

Under the facts of this paragraph, one legislative contact involving payment or reimbursement to influence the passage or defeat of legislation triggers both the lobbyist registration and reporting requirements of the Act unless the exemptions discussed in ISSUES 1B through 1D apply. However, the principal's report does not have to indicate that any major effort to support, oppose or modify legislation occurred because only one legislative contact was made urging the passage of one bill. The term "major effort to support, oppose or modify official action" in 5-7-208(5)(d), MCA, has been defined in ARM 44.12.102(6) to require that there be at least two direct communication contacts on one bill by a principal's lobbyist, employee, officer, agent or representative before the principal is obligated to list the bill in the principal's L-5 "major effort" report.

If an individual member makes one legislative contact involving direct communication with one legislator urging passage of a bill in the House and one legislative contact involving direct communication with one Senator urging passage of the same bill in the Senate, are there any reporting requirements?

4F.

Same analysis as in ISSUE 4E except that the principal must report the legislative contacts as a "major effort" because the principal's lobbyist made two direct communication contacts on the same bill.

If a member makes only one legislative contact involving direct communication with a legislator urging passage of HB 200 and makes one legislative contact involving direct communication with the member's Representative on five other pieces of legislation, is the member subject to any reporting requirements?

4G.

Same analysis as in ISSUES 4E and 4F. However, the principal does not have to list any of the six direct communication contacts as a "major effort" because the principal's lobbyist did not make at least two direct communication contacts on one bill.

If the answer to the preceding question is "yes," what expenditures must be reported?

4H.

See the response to ISSUE 4B.

ISSUE #5

The Montana Hospital Association includes as many as 30 facilities owned by county governments. The governing boards of these facilities often include elected county commissioners and other county officials (although unspecified, I will assume these "other" county officials could be elected county officials, appointed county officials or employees of the county). The staff for these county-owned hospitals are often county employees. It is asserted that these county-owned facilities are not the same kind of organizations as a car dealer or other businesses. What registration and reporting requirements apply to these county-owned facilities?

5A.

The same registration and reporting requirements apply to non-profit entities as for-profit entities. See the analysis of ISSUES 1A through 1D and pages 8-10 of this memorandum. The Act's reporting and registration requirements are triggered by payments and reimbursements to a principal's employees, officers, agents, attorneys and representatives to lobby.

The 2003 Legislature will consider SB 7, a bill to reinstate the exemption from lobbyist registration and reporting for local elected officials, including elected county officials. If enacted, the local elected official exemption would not require a county-owned hospital or the county to report any payments or reimbursements made to elected local officials who lobby on behalf of the hospital or the county. As members of the county-owned hospital board, lobbying by the local elected officials on behalf of the hospital would fall within the "acting within an official governmental capacity" language of the exemption.

ARM 44.12.212(2) does allow a lobbyist and principal to apply for a hardship waiver of the lobbyist licensing fee.

The employees of a hospital may not have the same interests as the hospital in seeing legislation enacted or defeated. If a nurse or lab technician employed by a hospital takes a position on legislation that is in direct opposition to the hospital's

position, is the hospital obligated to report the nurse's or lab technician's direct communication with legislators as a lobbying expenditure? What if the hospital does not know that the nurse or lab technician used hospital office space, equipment and supplies while on duty to send an e-mail, fax or letter to legislators?

5B.

An employer is generally not required to report lobbying activities by employees if the employees are engaged in unauthorized lobbying activities at work using the employer's office space, equipment, supplies and utilities. However, if the hospital asserts that the employees engaged in unauthorized lobbying activities at work, the Commissioner would consider such factors as the hospital's policies concerning use of hospital office space, equipment, supplies and utilities and whether the employees who engaged in unauthorized lobbying had been disciplined.

ISSUE #6

The elected leadership of the Montana Grain Growers Association comes to Helena to testify on pending legislation and talk to legislators at the request of the organization. The members volunteer their time and the organization does not compensate the leadership for any travel or other expenses. Sometimes the members identify themselves at hearings as representatives the MGGA. Do the members need to register as lobbyists? Is the MGGA member's farm a principal?

A related question asked on December 17, 2002 but not specifically included in your December 24, 2002 memorandum is: A rancher who is also a member of the Northern Plains Resource Council comes to Helena to testify and lobby on a pending environmental bill. Must the rancher/member register as a lobbyist? If the rancher owns a ranch that is incorporated and he pays for his travel to Helena out of the ranch corporation account, is the ranch corporation a principal?

Both of these questions have been discussed at length in the preceding analysis and responses. The same conclusions apply.

Thank you for the opportunity to address these important issues.